Filed 10/1/03 P. v. Vigil CA5



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SANDRA VIGIL,<br><br>Defendant and Appellant. | F040442<br><br>(Super. Ct. No. SC083548A)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey and Gary T. Friedman, Judges.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, J. Robert Jibson and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

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## FACTUAL AND PROCEDURAL BACKGROUND

A search warrant issued for the house where Sandra Vigil was living (the front residence) together with "the surrounding grounds and any garage, storage rooms, outbuildings of any kind, attached or unattached …." From the converted garage where Julie Anne Rojas was living (the rear residence) behind the front residence, police seized

11 grams of methamphetamine, pay-owe sheets, and digital gram scales with methamphetamine residue. From the front residence, police seized 745 milligrams of methamphetamine.

Rojas filed a motion to suppress the evidence seized from the rear residence on the ground that the search was outside the scope of the warrant. Vigil joined in Rojas's motion. Judge Humphrey heard argument, made findings of fact, and denied the motion:

> "[W]hen Ms. Rojas was questioned by [the detective] prior to the search of that detached building, he was attempting to ascertain whether it was a separate residence not included in the search warrant, or was a building that was included in the search warrant. And he questioned Miss Rojas, who indicated that it was Miss Vigil's residence and she was allowed to stay there by Miss Vigil. I will therefore find that it was included in the search warrant.
>
> "It's no different than being allowed to stay in a guest room or a detached garage that's been converted into a bedroom. It was part of Miss Vigil's residence, and was included in the description in the search warrant. Therefore, [the detective] was lawfully allowed to enter that building and conduct a search. I'm therefore denying the motion to suppress."

In a jury trial before Judge Friedman, Vigil was found guilty of maintenance of a place for the sale or use of methamphetamine and of possession of methamphetamine. (Health & Saf. Code, §§ 11366, 11377, subd. (a).)

## DISCUSSION

Vigil argues that the search of the rear residence was outside the scope of the warrant. The Attorney General argues the contrary.[1]

Article I, section 28, subdivision (d) of the California Constitution mandates that we apply federal constitutional law to adjudicate the constitutionality of the search of the rear residence. (*In re Lance W*. (1985) 37 Cal.3d 873, 886-887.) "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

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[1]In superior court, the prosecutor did not contest Vigil's standing to challenge the search of the rear residence. Here, the Attorney General acknowledges Vigil's apparently "reasonable expectation of privacy in the place searched sufficient to invoke Fourth Amendment protection."

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched*, *and the persons or things to be seized*." (U.S. Const., 4th Amend., italics added; *Walter v. United States* (1980) 447 U.S. 649, 656-657, fn. 8.) At issue here is the first of the two Fourth Amendment particularity clauses, the one addressing "the place to be searched."

Our duty as a reviewing court is to use "the totality of the circumstances analysis that traditionally has informed probable cause determinations." (*Illinois v. Gates* (1983) 462 U.S. 213, 238; *People v. Kraft* (2000) 23 Cal.4th 978, 1040; *People v. Camarella* (1991) 54 Cal.3d 592, 600-601.) Recognizing that a "grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting," we will test the affidavit "in a common sense and realistic fashion." (*United States v. Ventresca* (1965) 380 U.S. 102, 108; *People v. Frank* (1985) 38 Cal.3d 711, 725.) In "a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." (*United States v. Ventresca*, *supra*, at p. 106; *People v. Frank*, *supra*, at p. 722.) We construe the record in the light most favorable to the ruling and defer to the findings of fact, express or implied, for which there is substantial evidence, but we independently review the court's application of the law to the facts. (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.)

The investigation here began when a confidential informant told a narcotics detective that Vigil was selling methamphetamine from the front residence. The confidential informant made a controlled buy at the front residence from a person whom the confidential informant identified from a sheriff's office photograph as Vigil. In surveillance of the front residence, the detective saw people knocking on the door, entering and leaving just minutes later, and saw a person whom he identified from a sheriff's office photograph as Vigil freely entering and leaving. On the basis of an affidavit from the detective setting out those facts, a warrant issued authorizing a search for methamphetamine, currency, and paraphernalia consistent with the sale of methamphetamine, and documents and personal property tending to establish the identity

of persons in control of the premises or in possession of methamphetamine or paraphernalia.

During his surveillance, the detective looked through an open gate and saw a detached building (the rear residence) with a door facing the open gate. The front residence was on the other side of the rear residence from the door facing the open gate. He never saw anyone enter or leave the rear residence and had no idea if anyone lived there. Not one word about the rear residence was in his affidavit. The only residence to which the warrant referred was the front residence.

After the detective arrived to execute the warrant, but before the search occurred, Rojas told him that she was staying in the rear residence, that her boyfriend sometimes stayed there with her, and that she had the permission of her friend Vigil, who owned the rear residence, to stay there. The detective went inside the rear residence where he saw a mattress, an entertainment center with a stereo, and a bathroom. His observations were entirely consistent with those of Rojas's friend that a futon bed, stereo, TV, bathroom with toilet, shower, and sink, and kitchen area with oven, range top, and sink were inside the rear residence. Yet the detective authorized the search anyway.

"'[A] warrant to search "premises" located at a particular address is sufficient to support the search of outbuildings and appurtenances in addition to a main building when the various places searched are part of a *single integral unit*. [Citations.]'" (*People v. Weagley* (1990) 218 Cal.App.3d 569, 573, italics added, quoting *People v. Dumas* (1973) 9 Cal.3d 871, 881, fn. 5.) The Fourth Amendment requirement "that a particular 'place' be described in the warrant when applicable to dwellings means a *single living unit*, that is to say the residence of one person or family …." (*People v. Estrada* (1965) 234 Cal.App.2d 136, 146, italics added.) A warrant to search multiple living units, "absent a showing of probable cause for searching *each unit* or for believing that the entire [premises are] a *single living unit*," is void. (*Ibid*., italics added.)

Police who discover two separate living units during a search pursuant to a warrant for a single living unit are "on notice of the risk that they might be in a unit

erroneously included within the terms of the warrant" and are "required to discontinue the search" where failure to realize the overbreadth of the warrant is not "objectively understandable and reasonable." (Cf. *Maryland v. Garrison* (1987) 480 U.S. 79, 87, 88.) Police who execute a search warrant for a front residence need a separate warrant to search a rear residence inside a converted garage if the character of the latter building as "a separate dwelling for which a separate warrant was required" becomes apparent once police enter. (*U.S. v. Cannon* (9th Cir. 2001) 264 F.3d 875, 879.) The record here shows that the police had neither probable cause to search the rear residence nor probable cause to believe that the front residence and the rear residence were a single living unit and that the search of the rear residence was outside the scope of the warrant. (*Illinois v. Gates*, *supra*, 462 U.S. at pp. 238-239; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1040; *People v. Camarella*, *supra*, 54 Cal.3d at pp. 600-601.)

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.) Admission of illegally seized evidence is subject to harmless error analysis. (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1036.) Since almost all of the methamphetamine in evidence was seized from the rear residence, the prosecutor urged the jury to adopt a theory of constructive possession not only to tie Vigil to the methamphetamine in the rear residence but also to implicate her in maintenance of the rear residence for the sale or use of methamphetamine. On that theory, the prosecutor argued that Vigil operated the front residence and the back residence in synergy:

> "There was a house with a small amount, small packaging up front, a house with a bigger amount of dope, with scales, sufficient for that larger amount to be broken down in the back. There was money in the back, in the safer place."

"What does this mean?" the prosecutor rhetorically asked. "It means it's a drug house and that's what we have charged [her] with." The verdict of guilt on the maintenance count shows that the jury made precisely the critical inference—the nexus between Vigil and the rear residence—that the prosecutor sought. On that record, we cannot declare

harmless beyond a reasonable doubt on either the maintenance count or the possession count the erroneous admission of evidence from the search of the rear residence.[2] (Cf. *People v. Dyke* (1990) 224 Cal.App.3d 648, 663-664.)

**DISPOSITION**

We reverse the judgment and remand the case to superior court with instructions to vacate the order denying the motion to suppress and to enter a new order granting the motion to suppress.

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GOMES, J.

WE CONCUR:

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LEVY, Acting P.J.

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CORNELL, J.

[2]In light of our holding, we need not reach Vigil's arguments about jury selection, conspiracy theory, profiling evidence, or insufficiency of the evidence.